

STATE OF MICHIGAN
COURT OF APPEALS

JAMES BLACKMON and MAMIE
BLACKMON,

UNPUBLISHED
February 21, 2003

Plaintiffs-Appellants/Cross-
Appellees,

v

No. 234623
Genesee Circuit Court
LC No. 00-067735-NH

GENESYS REGIONAL MEDICAL CENTER and
DR. K. MEYER, D.O.,

Defendants-Appellees/Cross-
Appellants,

and

DR. PAMELA MOORE-LUCAS, D.O., and DR.
WILLIAM Y. CHILDS, D.O.,

Defendants.

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal by right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). We affirm.

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendants. We disagree. Absent a factual dispute, the determination whether a claim is barred by the expiration of the limitations period is a question of law that is reviewed de novo. *Young v Sellers*, ___ Mich App ___, ___ NW2d ___ (Docket No. 239829, issued 12/20/02), slip op p 2; *Hudick v Hastings Mutual Ins Co*, 247 Mich App 602, 605-606; 637 NW2d 521 (2001). Further, a trial court's grant of summary disposition under MCR 2.116(C)(7) is reviewed de novo on appeal. *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999).

In MCL 600.2912d, the Legislature set forth the requirements for commencing a medical malpractice claim. MCL 600.2912d provides, in relevant part:

(1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or . . . the plaintiff's attorney *shall file with the complaint an affidavit of merit* signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

* * *

(2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

(3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in [MCL 600.2912b(6)], the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint. [Emphasis added.]

“The existing case law construing the statutory authority governing medical malpractice actions states that the failure to timely file a complaint *and* an affidavit of merit will not toll the applicable limitations period.” *Young, supra*; see, also, *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000). Although MCL 600.2912d(2) provides an additional twenty-eight days to file an affidavit of merit for good cause, the mere filing of a motion to extend the time for filing an affidavit of merit is insufficient to toll the statute of limitations. *Barlett v North Ottawa Community Hosp*, 244 Mich App 685, 690-692; 625 NW2d 470 (2001). It is the granting of a motion to extend the time for filing an affidavit of merit that tolls the period of limitation in a medical malpractice action. *Id.* at 692-693.

In the present case, on the last possible day to file their medical malpractice complaint in this matter before the statute of limitations expired, plaintiffs filed a complaint along with an ex-parte petition seeking a twenty-eight-day extension of time under MCL 2912d(2) in which to file their affidavit of merit. However, the order granting plaintiff's motion for a twenty-eight-day extension of time was not signed until the following day, one day after the statute of limitation had expired. Relying on *Barlett, supra*, the trial court granted defendants' motion for summary disposition after stating that the order granting an extension of time was not entered until after the expiration of the statute of limitations. We conclude on the basis of *Barlett* that the trial court properly granted defendants' motion for summary disposition because the court's actual grant of an extension of time did not occur until after the expiration of the statute of limitations.

To the extent that plaintiffs are now arguing for the first time that they had an automatic extension of time in which to file their affidavit of merit pursuant to MCL 600.2912d(3), we will not address this argument. Plaintiffs failed to raise this issue below, and thus, the trial court did not decide it. The issue has not been preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In their petition and at the motion hearing, plaintiffs requested relief and a twenty-eight-day extension under MCL 600.2912d(2). Plaintiffs sought no relief under MCL 600.2912d(3).

In light of our previous conclusion, we need not address defendants' other arguments.

We affirm.

/s/ Jane E. Markey

/s/ Michael R. Smolenski

/s/ Patrick M. Meter